

**Peter E. Dunkley, Esq.**  
**Nevada Bar No. 11110**  
**WOLFE & WYMAN LLP**  
**980 Kelly Johnson Drive, Suite 140**  
**Las Vegas, NV 89119**  
**Tel: (702) 476-0100**  
**Fax: (702) 476-0101**  
pedunkley@wolfewyman.com

**Attorneys for Defendants**  
**NATIONAL CITY MORTGAGE**  
**COMPANY; MICHAEL DEMING; AND**  
**VIVIAN FURLOW**

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

NICHOLAS OLIVA; JOAN OLIVA, individuals,  
Plaintiffs,  
v.

NATIONAL CITY CORPORATION; NATIONAL  
CITY MORTGAGE COMPANY; NATIONAL  
CITY BANK OF INDIANA; MICHAEL  
DEMING, individually and as an employee/agent  
of National City; VIVIAN FURLOW, individually  
and as an employee/agent of National City; and  
DOES I through XX, inclusive

Defendants.

CASE NO.: 2:08-cv-01559-PMP-LRL

Nevada District Court Case No.: A570250

**DEFENDANTS' RESPONSE TO**  
**PLAINTIFFS' MOTION FOR ORDER TO**  
**SHOW CAUSE**

**COMES NOW**, Defendants, National City Mortgage Company ("National City"), Michael Deming, and Vivian Furlow (hereinafter collectively "Defendants"), by and through counsel, Wolfe & Wyman LLP, and hereby responds to Nicholas Oliva and Joan Oliva's ("Plaintiffs") Motion for Order to Show Cause, and to Strike Defendants' Answer, or Alternatively, to take continued Depositions of Defendants Deming and Furlow, (hereinafter "Motion for OSC").

///

///

///

///

1 This Response is made and based upon the documents and pleadings on file herein, the points  
2 and authorities which follow and all exhibits attached hereto, and any oral argument the Court may  
3 allow.

4 DATED: September 3, 2010

WOLFE & WYMAN LLP

6 By: /s/ Peter E. Dunkley

7 PETER E. DUNKLEY, ESQ.

8 Nevada Bar No. 11110

9 980 Kelly Johnson Drive, Suite 140

10 Las Vegas, NV 89119

11 Phone (702) 476-0100

12 Fax (702) 476-0101

13 Attorneys for Defendants

14 **NATIONAL CITY MORTGAGE COMPANY;**

15 **MICHAEL DEMING AND VIVIAN FURLOW**

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

///

///

///

///

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiffs Motion for OSC is their attempt to sidestep the Court's Order granting "limited relief" pursuant to Fed. R. Civ. P. 56(f). (See Docket # 67, p. 2:21-24 (hereinafter "Order") attached hereto as Exhibit A.) The Order states that Magistrate Judge Leavitt's Order denying Plaintiffs' Motions to Reopen Discovery and to Compel Discovery Responses is affirmed. (See Order, 2:8-12.) Discovery is therefore still closed. Nevertheless, despite the "limited relief" granted by the Court, Plaintiffs attempt to, in effect, completely reopen discovery beyond the scope of: (1) Fed. R. Civ. P. 56(f), (2) Plaintiffs' own Request for Production, and (3) this Court's Order. Plaintiffs' Motion for OSC should be denied.

**II. FACTS**

In May of 2005, Plaintiffs obtained a loan for \$680,000.00 ("Subject Loan") to purchase real property. To obtain the Subject Loan, over the course of two weeks, Plaintiffs executed voluminous documents including but not limited to a Uniform Residential Loan Application, a Promissory Note, a Deed of Trust, and Truth in Lending Disclosure Statements, each of documents indicated that the Subject Loan is a 3 year adjustable rate mortgage ("ARM"). Plaintiffs allege the loan was procured by fraud.

After the close of discovery, and after Defendants timely filed a Motion for Summary Judgment (Docket #45), Plaintiffs sought relief from the Court and filed Motions to Compel Discovery (Docket #48), and to Reopen Discovery (Docket # 49). Plaintiffs' Motions were denied (Docket # 60). Plaintiffs requested a review of the Order denying the Motions. The Order denying Plaintiffs' Motions was affirmed. (See Docket #67, Order, 2:8-12.)

On July 7, 2010, the Court granted Plaintiffs "limited relief" pursuant to Fed. R. Civ. P. 56(f). The Court's Order grants Plaintiffs two limited paths by which to obtain information they seek: (1) through production of documents with published rates, and (2) through depositions on the issue of the interest rates paid by Plaintiffs.

The Order states that Defendants must "produce...documents...reflecting published interest rates...as previously requested by Plaintiffs." (Order, 2:21-26). The Order further states that the

parties “shall conduct any additional depositions necessary to complete discovery on the issue of whether between May 2005 and May 2008, Plaintiffs paid monthly interest rates consistent with a seven-year adjustable rate mortgage rather than a three-year adjustable rate mortgage.” (Order, 3:2-6.) The Order allows the parties 60 days to complete this limited discovery. (*Id.*, 3:6-7.)

On August 5, 2010, Defendants complied with the Court’s Order and Plaintiffs’ request for production. A copy of Defendants Supplemental Response to Plaintiffs’ Request for Production is annexed hereto as Exhibit B. Having no documents that show *published* rates, as requested by Plaintiffs’ Request for Production, and as Ordered by the Court, National City, in the spirit of cooperation and subject to Plaintiffs agreeing to keep the internal information confidential, offered to produce *internal* documents, which are not published and which contain unpublished proprietary commercial information. Plaintiffs declined to accept the documents.

On August 11th and 13th, Plaintiffs conducted the depositions of Michael Deming and Vivian Furlow respectively. Despite the Order which states “depositions necessary to complete discovery on the issue of whether between May 2005 and May 2008, Plaintiffs paid monthly interest rates consistent with a seven-year adjustable rate mortgage rather than a three-year adjustable rate mortgage” (Order 3:2-6) Plaintiffs attempted to proceed with lines of questioning far beyond the scope of the Court’s Order. Accordingly, Deming and Furlow were instructed not to answer.

On August 30, 2010, Plaintiffs filed the Motion for OSC.

### III. DISCUSSION

Plaintiffs’ Motion for OSC should be denied because Defendants have fully complied with the Court’s Order. Plaintiffs’ overly broad interpretation of the Court’s Order is neither a basis to find Defendants in contempt, nor a basis for the sanctions Plaintiffs seek against Defendants. Plaintiffs’ Motion should be denied.

#### A. Defendants cannot be in contempt for failing to produce documents showing “published rates” because no such documents exist.

Defendants cannot be held in contempt for failing to produce documents which do not exist. The Court’s Order requires Defendants to produce documents “reflecting the published interest rates...as previously requested by Plaintiffs.” (Order 2: 24-26.) The Court’s Order is consistent

1 with Plaintiffs' Request for Production Number 7, which states: "Produce documents that show  
2 published rates from National City Bank from the period of April 14 to May 9, 2005." See,  
3 Defendants Supplemental Response, Exhibit B. The plain meaning of the term "publish" is: "to  
4 distribute copies ... to the public." Black's Law Dictionary, 572 (2d Pocket ed. 2001). National  
5 City did not publish its interest rates for the relevant time period, and has no documents showing  
6 published interest rates for the relevant time.

7 National City confirmed that that the documents contained proprietary commercial  
8 information, that could harm National City should the information become public information or  
9 otherwise fall into the hands of competing mortgage lenders. Nevertheless, National City stands  
10 ready to produce document which contain no information that was published or otherwise made  
11 public, should Plaintiffs be willing to agree to keep the documents confidential.

12 Thus, Defendants' counsel contacted Plaintiffs' counsel and explained that National City has  
13 no "published" information, but is completely willing to produce internal documentation, which is  
14 directly relevant to Plaintiffs' loan, on the condition that Plaintiffs agree to keep the information  
15 confidential and return the documents at the resolution of this litigation. Plaintiffs refused.

16 Pursuant to Fed. R. Civ. P. 26(c)(1)(G) a party may move for a protective order to protect  
17 information such as a "trade secret" or "commercial information." Further, a court "may make any  
18 order which justice requires to protect a party...[by requiring that] commercial information ...be  
19 revealed in a designated way. Id.; Phillips v. General Motors Corp., 289 F.3d 1117 (9th Cir. 2002).  
20 Defendants have not moved for such a protective order because Plaintiffs *have never asked for*  
21 *unpublished* internal interest rate documentation. Nevertheless, in the spirit of cooperation, National  
22 City stands ready to produce such unpublished internal documents, if Plaintiffs will agree to keep the  
23 documents confidential. To that end, Defendants, as part of their supplemental Disclosure included  
24 a proposed Stipulation and Order whereby Plaintiffs would agree to keep the documents confidential  
25 and return them at the conclusion of the litigation. See, Defendants' Supplemental Response,  
26 Exhibit B.

27 ///

28 ///

Both Plaintiffs' Request for Production and the Court's Order refer to "published rates." National City does not publish its rates, nor does it have documents that show "published rates." Accordingly, Defendants cannot be in contempt for failing to produce documents which do not exist.

**B. Defendants are not in contempt because the depositions were specifically limited to relevant interest rate information.**

Defendants are not in contempt for failing to answer certain questions at their depositions because the Court's Order expressly limited the scope of permissible questioning. To constitute contempt, one must be disobedient to an order by a court. NRS § 22.010(3). Courts may issue orders limiting the scope of deposition. *See, e.g., American Cas. Co. of Reading, Pa. v. Krieger*, 160 F.R.D. 582, 591 (S.D.Cal., 1995) (Court issues an order limiting the scope of questioning). The Federal Rules of Civil Procedure state: [a] person may instruct a deponent not to answer only when necessary to preserve a privilege, *to enforce a limitation ordered by the court*, or to present a motion under Rule 30(d)(3). Fed. R. Civ. P. 30 (c)(2)(emphasis added). *S.E.C. v. Oakford Corp.*, 141 F.Supp.2d 435, 437 (S.D.N.Y. 2001).

In this case, the Court's Order provides for: "depositions necessary to complete discovery on the issue of whether between May 2005 and May 2008, Plaintiffs paid monthly interest rates consistent with a seven-year adjustable rate mortgage rather than a three-year adjustable rate mortgage." *See*, Order, 3:2-6. Thus, the whole purpose of the limited relief was to obtain additional interest rate information. *See* Order, 2:21 through 3:6.

Defendants duly appeared for their depositions and answered Plaintiffs' background questions and questions clearly within the scope of the Court's Order. However, many of Plaintiffs' deposition questions veered into subject matter far beyond the scope of the Order and that had no connection to the interest rates:

Q. Okay. And is that how you knew Mr. Boyce?

Mr. Dunkley: Objection, this is still way beyond the scope of the interest rates.

A. Yes, that's how I know Mr. Boyce.

...

///

1 Q. Have you corresponded with him in any way via e-mail or letters or  
2 anything?

3 Mr. Dunkley: You know what Jason, I'm going to object again. It's beyond the  
4 scope of the order, and I'm just going to – pretty soon I'm going to  
5 instruct him not to answer any questions that are beyond the scope.

6 Mr. Bach: Okay, I understand.

7 Mr. Dunkley: Thank you.

8 See Deposition of Michael Deming, p. 56:18 through 57:22, attached as Exhibit C. Mr. Boyce is not  
9 a party to this litigation and has no affiliation with National City and no access to, or direct  
10 knowledge of, any interest rates or other loan terms available to or obtained by Plaintiffs from  
11 National City. For a more complete discussion of Mr. Boyce, see Defendants Motions in Limine  
12 (Docket # 43).

13 Likewise, Plaintiffs asked questions far beyond the scope the issue of interest rates at Vivian  
14 Furlow's deposition. Again, because the Court's Order limited the scope of the depositions to "the  
15 issue of whether [during the relevant time period] Plaintiffs paid monthly interest rates consistent  
16 with a seven-year adjustable rate mortgage, rather than a three-year adjustable rate mortgage" such  
17 instructions not to answer questions beyond the scope of the Order are appropriate. Fed. R. Civ. P.  
18 30(c)(2).

19 Because discovery is closed, questions not on the issue of interest rates as set forth in the  
20 Order, are subject to both objections and instructions not to answer. Fed. R. Civ. P. 30(c)(2).  
21 Therefore, Defendants have not been disobedient to the Court's Order. Defendants are not in  
22 contempt.

23 **C. Plaintiffs are not entitled to Fed. R. Civ. P. 37 sanctions.**

24 Plaintiffs are not entitled to Rule 37 sanctions. In order to be entitled to sanctions under Rule  
25 37, a person must fail to comply with or obey a court order. Fed. R. Civ. P. 37(b). Plaintiffs request  
26 the Court to sanction Defendants by striking Defendants answer. Motion for OSC 12:6-8.

27 ///

28 ///

Striking an answer has the effect of entry of default. Jackson v. Microsoft Corp., 211 F.R.D. 423 (W.D. Wash. 2002). In that case, “Even if the Court were to conclude that defense counsel made material misrepresentations to the Court, the remedies sought by plaintiff are inappropriately harsh.” Id. at 434.

Here, as discussed above, such a sanction would be inappropriately harsh. Plaintiffs cannot even show that Defendants have disobeyed the Court’s Order. Plaintiffs appear confuse their own request for documents that show “published rates”, which do not exist, with the actual documents that Defendant’s are willing to produce, but which do not contain “published rates.” As stated above, Defendants cannot be held in contempt for failing to produce documents which do not exist. Therefore, Plaintiffs are not entitled to Fed. R. Civ. P. 37 sanctions for Defendants’ purported failure to produce non-existent documents.

Furthermore, the Court’s Order limited the scope of permissible questioning at Deming and Furlow’s depositions. Defendants were instructed not to answer only those questions which were far beyond the scope of the issue of interest rates. Such instructions are appropriate pursuant to Fed. R. Civ. P. 30(c)(2). Therefore, Plaintiffs are not entitled to sanctions under Fed. R. Civ. P. 37 when the Court’s Order provides limited relief specifically on the issue of interest rates paid by Plaintiffs.

Plaintiffs’ characterization of Defendants purported “strong arm tactics” merely affirm Defendants’ willingness to cooperate with the order by agreeing to produce documents for which Plaintiffs have not asked, and which the Order does not require Defendants to produce.

Plaintiffs’ statement that Defendant’s “waiving [sic] the documents in Plaintiffs’ counsel’s face” grossly mischaracterizes Defendants’ ongoing willingness to produce internal documentation with their promise to keep the information confidential. Counsel for both parties sat across from each other at a large conference table and at no point were any documents waved before anyone’s face. Defendants can only speculate as to actual reason why Plaintiffs still refuse to agree to keep the unrequested and unpublished documents confidential.

Defendants have fully complied with the Court’s Order. Throughout this litigation, Defendants have honored the Orders and deadlines of this Court. Plaintiffs are not entitled to sanctions under Fed. R. Civ. P. 37.



1           **D. Plaintiffs are not entitled to continue the depositions and are not entitled to**  
 2           **production of documents for which they have never asked.**

3           Plaintiffs are not entitled to continue the depositions of Deming and Furlow. Plaintiffs have  
 4           had more than one chance to depose Defendants Deming and Furlow during the course of regular  
 5           discovery. However, regular discovery ended on January 7, 2010. Defendants even agreed to have  
 6           their depositions taken after the close of discovery, yet Plaintiffs inexplicably vacated the  
 7           depositions. (See Docket # 40.) If Plaintiffs had proceeded with Deming and Furlow's depositions  
 8           within the discovery period, Plaintiffs could have asked questions on any unprivileged topic.  
 9           Plaintiffs failed to do so.

10           Instead, Plaintiffs were granted "limited relief" to conduct "depositions necessary to  
 11           complete discovery on the issue of [the interest rates paid by Plaintiffs]." Order, pp. 2:21 through  
 12           3:6. On its face the Order does not reopen discovery: "the Order (Doc. # 60)[denying Plaintiffs'  
 13           Motion to Reopen Discovery] entered by Magistrate Judge Leavitt is hereby affirmed." Order 2:8-  
 14           12.

15           Thus, Plaintiffs were allowed to proceed with depositions "on the issue" of interest rates.  
 16           Plaintiffs should not be permitted to side-step the Court's Orders by continuing depositions of  
 17           Deming and Furlow, well past the close of discovery, and on issues outside the "limited relief"  
 18           granted by the Court's Order.

19           Plaintiffs still argue that Defendants should produce non-existent documents and attempt to  
 20           use this as a basis to allow them to "complete the depositions of Deming and Furlow." Motion for  
 21           OSC 12:19. However, as stated above, Defendants have no such documents showing "published  
 22           rates" but are still willing to produce non-public unpublished information subject to a confidentiality  
 23           agreement. See, e-mail from Peter Dunkley, dated August 4, 2010, attached as Exhibit D. Plaintiffs  
 24           refused to do so. See, e-mail from Jason Bach, dated August 5, 2010, attached as Exhibit E.  
 25           Plaintiffs even refused to discuss the scope of questioning in advance of the depositions. *Id.*

26           In this case, Plaintiffs had ample opportunity to pursue discovery during the: (1) regular  
 27           discovery period which ended January 7, 2010, and (2) the extended discovery period which  
 28           provided for the late depositions of Defendants, and (3) the additional limited relief granted by the

1 Court's Order. Plaintiffs are not entitled to re-depose Deming and Furlow, nor are Plaintiffs entitled  
 2 to the unpublished internal interest rate sheets without agreeing to keep them confidential. See,  
 3 Qualls By and Through Qualls v. Blue Cross of California, Inc., 22 F.3d 839, 844 (9th Cir.  
 4 1994)(movant must diligently pursue previous discovery opportunities).

5 Defendants duly appeared for their depositions, and answered questions until the line of  
 6 questioning was far outside the issue of interest rates. Plaintiffs are not entitled to continue the  
 7 depositions of Deming and Furlow. Plaintiffs are likewise not entitled to force Defendants to  
 8 disclose internal unpublished interest rate information without a confidentiality agreement or  
 9 protective order.

10 **E. Plaintiffs are not entitled to attorneys' fees and costs.**

11 Plaintiffs are not entitled to attorneys' fees and costs. Plaintiffs argue that they are entitled to  
 12 fees and costs because of "Defendants' [purported] refusal to comply" with the Court' Order.  
 13 Motion for OSC 12:26-27. Fed. R. Civ. P. 37(b)(2)(C) provides that a party who fails to comply  
 14 with an order is subject to pay "reasonable expenses...unless the failure was substantially justified  
 15 or other circumstances make an award of expenses unjust."

16 In this case, Defendants fully complied with the Court's Order. It is Plaintiffs who are  
 17 refusing to comply with the Order: (1) Plaintiffs demand documents which do not exist or  
 18 alternatively, which which they did not ask, which includes unpublished information, and (2)  
 19 Plaintiffs intentionally disregarded the limited scope of the allowed depositions by repeatedly asking  
 20 beyond the scope of interest rates paid by Plaintiffs to the point that Defendants were instructed to  
 21 not answer the inappropriate questions.

22 The language of the Order is clear, Defendants must produce documents with "published  
 23 rates," and the parties my conduct "depositions necessary to complete discovery on the issue of  
 24 whether between May 2005 and May 2008, Plaintiffs paid monthly interest rates consistent with a  
 25 seven-year adjustable rate mortgage rather than a three-year adjustable rate mortgage."

26 Upon learning that Defendants had no such published documents, Defendants notified  
 27 Plaintiffs and supplemented their document production. See, Exhibit B. Furthermore, Defendants  
 28 stand willing to produce additional documents subject to a confidentiality agreement or protective

order, which Plaintiffs have refused to sign. Plaintiffs' refusal to agree to keep proprietary commercial information confidential should not serve as a basis to sanction Defendants.

Defendants duly appeared for their depositions "on the issue" of interest rates. Only when Plaintiffs' questions varied from the Order, did Defendants refuse to answer.

Alternatively, should the Court determine that Defendants have failed to comply with the Order, Plaintiffs are still not entitled to costs and fees because Defendants failure would be substantially justified given the express language of the Order regarding the document production and the scope of the depositions. Additionally, given Plaintiffs penchant for vacating depositions at the personal expense Defendants, including Michael Deming, who lives in Utah and travels at his own expense, would provide "other circumstances [to] make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). Plaintiffs are not entitled to costs and fees under Fed. R. Civ. P. 37(b).

#### IV. CONCLUSION

Plaintiffs have had more than a year to complete discovery and have failed to do so. Plaintiffs have not shown how Defendants have failed to comply with the Court's Order. Plaintiffs' prior lack of diligence to pursue discovery does not excuse them from complying with the Federal Rules of Civil Procedure, and this Court's Orders. For the above-mentioned reasons, Defendants respectfully request the Court to deny Plaintiffs' Motion in its entirety, and for such other further relief as this Court deems just and proper.

DATED: September 3, 2010

WOLFE & WYMAN LLP

By: Peter E. Dunklev

PETER E. DUNKLEY, ESQ.

Nevada Bar No. 11110

980 Kelly Johnson Drive, Suite 140

Las Vegas, NV 89119

Phone (702) 476-0100

Fax (702) 476-0101

Attorneys for Defendants

**NATIONAL CITY CORPORATION;**

**NATIONAL CITY MORTGAGE COMPANY;**

**NATIONAL CITY BANK OF INDIANA;**

**MICHAEL DEMING AND VIVIAN FURLOW**

H:\Matters\National City Bank (1264)\069 (Oliva)\Pleadings\Response to Motion for Order to Show Cause.doc

**CERTIFICATE OF SERVICE**

1. On September 3, 2010 I served the RESPONSE TO PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE by the following means to the persons as listed below:

  X   a. EFC System (you must attach the "Notice of Electronic Filing", or list all persons and addresses and attach additional paper if necessary):

Jason J. Bach, Esq. – e-mail – Jbach@bachlawfirm.com

\_\_\_\_ b. United States Mail, postage fully pre-paid (List persons and addresses. Attach additional paper if necessary):

By: /s/ Katia Ioffe  
Katia Ioffe  
An employee of Wolfe & Wyman LLP